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In the Supreme Court of the United States

OCTOBER TERM, 1985

HENRY LAVADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence seized from petitioner should be suppressed on the ground that his detention by local officers pending the arrival of Customs officials constituted an illegal arrest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 750 F.2d 1527.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1985. The petition for a writ of certiorari was filed on July 6, 1985, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. See Point 1, *infra*, page 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress, petitioner was convicted at a jury trial in the United States District Court for the Southern District of Florida of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 955a(c), and of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 955a(a).[1] He was sentenced to consecutive terms of five years' imprisonment on each count and to a special parole term of two years. The court of appeals affirmed.

1. The evidence adduced at the suppression hearing and at trial showed that, on the afternoon of August 27, 1982, two boats fled when approached by a Coast Guard cutter along the west coast of South Florida. The cutter eventually stopped the larger boat and found seven persons on board, including petitioner. After some discussion, the boat again fled with the Coast Guard in pursuit. The boat eventually beached on Keewayden Island, where the entire crew jumped ship and ran into the woods. The Coast Guard boarded the boat and found 128 bales of marijuana. Pet. App. A7-A9.

The Coast Guard notified the County Sheriff's Office and the Florida Marine Patrol of these events, and a search for the crew was commenced. About an hour and a half after the search began, the search team apprehended three individuals fleeing down the beach; when an officer identified himself, one of the three men responded "Colombians." Shortly thereafter, the search team apprehended a fourth individual to whom

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[1] Petitioner's co-defendants—Lee Roy Sawyer, Alexander Molina, Orlando Velasquez-Silva, Nicanor Carranza-Villa, Rafael Antono Garcia-Andriany and Alejandro Ferreira-Rengifo—were all convicted on the same charges.

one of the three suspects was shouting and signalling. Subsequently, a tracking bloodhound, who had been following a trail to where the suspects were apprehended, alerted to the four suspects. Pet. App. A9-A11; Tr. 379-397. The County Sheriff's office informed the Coast Guard that they had found four suspects in Keewayden Island; at that time, a Coast Guard officer who had seen all the crew members on the boat gave the County Sheriff's office a full description of petitioner and the other two suspects who had not yet been apprehended (Tr. 69-71, 235-236, 258).

At about 10:00 a.m. the following morning, a biologist at work in a remote wildlife area two miles from Keewayden Island came upon petitioner and the other two missing crew members who had jumped ship with him. The three men were wearing stained T-shirts and shorts, had no camping gear or provisions, and were bug-bitten, scratched, and wet. Petitioner told the biologist that they had left their boat near Cape Romano, which was 20 miles from their present location, and had wandered away from the boat and gotten lost. The biologist, who was familiar with the area, knew that it was not possible to travel overnight from Cape Romano to where they were without using a boat. Pet. App. A11.

Petitioner asked the biologist how they could get out of the area, and the biologist offered them a ride. He drove them to a marine laboratory six miles away, where petitioner telephoned a woman in Key West, Florida, and arranged for someone to make the five-hour drive from Key West to the marine laboratory to pick them up. The biologist informed the director of the laboratory of what had happened, and the director in turn telephoned the County Sheriff's Department. Pet. App. A11-A12; Tr. 456-458. The

Sheriff's Department sent three officers to the marine laboratory to detain the suspects and notified the Customs Service that it believed that the three missing men had been found (Tr. 25-26, 458-460, 464, 502-503).

Within 15 minutes, three armed, uniformed officers from the Sheriff's Department arrived at the laboratory, where they detained the three men for 30 to 60 minutes pending the arrival of the Customs officials (Tr. 25-26, 45-46, 72-73, 113, 123-125). The officers did not question or formally arrest the three suspects, but merely informed them that they were to wait for Customs officials to arrive (Tr. 26, 127). When the Customs officers arrived at the laboratory they identified themselves to petitioner, advised him of his *Miranda* rights, and told him that he was the subject of an investigation (Tr. 26-27). When asked to identify himself, petitioner gave his wallet to one of the officers (Tr. 27). The wallet contained identification showing petitioner to be Henry Lavado; papers identifying him as the operator of the boat; receipts for diesel fuel procured in Colombia and Haiti; and a piece of navigation chart later identified as matching a larger portion found aboard the boat. Pet. App. A12-A13.

2. The court of appeals affirmed (Pet. App. A1-A20) the district court's denial of petitioner's motion to suppress. The court found that the local officers had reasonable suspicion to believe that petitioner and his two companions were the crew members being sought by the Coast Guard. The court also found that the detention of petitioner and his companions had occurred at the functional equivalent of the border; hence, the local officers had acted properly in detaining the suspects while awaiting the arrival of

Customs officials. Given the location at which the detention occurred, the court held, the one-hour detention was not unreasonable. *Id.* at A18-A19.

ARGUMENT

1. At the outset, we submit that the Court should not accept this case for review because of the substantial untimeliness of the petition. The judgment of the court of appeals was entered on January 24, 1985, and the petition therefore was due for filing on March 25, 1985. It was not filed until July 6, 1985, and therefore was more than three months out of time. The sole issue presented in the petition concerns whether the district court erred in denying petitioner's motion to suppress. Since this contention has no bearing upon the issue of guilt or innocence, we submit that the Court should not consider it when presented in a petition that is so far out of time. To entertain this contention now, when the judgment of conviction has long since become final, would circumvent the policies restricting collateral attacks upon final judgments on the basis of Fourth Amendment exclusionary rule claims. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

2. While we believe that the preceding point should be dispositive of this petition, we will briefly discuss the reasons why the court of appeals' rejection of petitioner's contention (Pet. 7-29) that he was illegally arrested when the local officials detained him pending the arrival of Customs officials was correct and not worthy of further review.

a. The court of appeals correctly held that the detention here did not exceed the lawful bounds of an investigative stop. It is undisputed that the local officers had, at a minimum, reasonable suspicion to believe that petitioner and his companions were the

three missing drug smugglers. Clearly, however, the appropriate officials to investigate and confirm that suspicion were the Customs officers who were familiar with the crime and had previously seen the crew of the boat. Contrary to petitioner's assertion (Pet. 20-21), holding a suspect until more knowledgeable officers can arrive is a legitimate ground for an investigative detention, provided it is not unduly prolonged, even if the detaining officers do not themselves conduct any investigation. See *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 12 & n.5; *United States* v. *Moore*, 638 F.2d 1171, 1173-1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976).

The gist of petitioner's contention appears to be that the length of the detention here necessarily converted it into an arrest (see Pet. 17-23).[2] This is simply not so. The Court has repeatedly declined to set a specific temporal limitation on the length of an investigative stop; rather the question that must be resolved in each particular factual situation is whether the police are diligently pursuing a means of investigation that is likely to resolve the matter in a reasonable period of time. See *United States* v. *Sharpe*, slip op. 9, 11; *United States* v. *Place*, 462 U.S. 696, 709 (1983); *Michigan* v. *Summers*, 452 U.S. 692, 701 n.14 (1981). The investigation here

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[2] The exact length of the detention is uncertain, but it is clear that it lasted no more than one hour. Petitioner testified (Tr. 99) that it was one hour. One of his companions testified that the detention lasted 30 minutes (Tr. 113); the other testified that it lasted 30-45 minutes (Tr. 125). Customs Agent Galante testified that he believed the suspects had been detained for between 30 and 60 minutes (Tr. 72-73).

was diligent. It was reasonable for the local officials to wait for the arrival of Customs agents; those agents were summoned immediately and arrived within the hour. In these circumstances, the court of appeals correctly reached the factbound conclusion that "the one-hour detention in this case passes muster" (Pet. App. A19).[3]

b. The conclusion that a detention of up to one-hour in this case did not violate the Fourth Amendment is strengthened when one considers that, on the facts here, the detention was only a minimal intrusion into petitioner's liberty. In *Michigan* v. *Summers*, the Court noted that the detention there was not particularly intrusive given that the detainees likely would have chosen voluntarily to remain to observe the search of their possessions. 452 U.S. at 701. By the same token, it is undisputed that petitioner's plan—if he had never been detained by the local police officers—was to wait at the laboratory for five hours for his ride to arrive from Key West. Thus, while the officers technically did detain peti-

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[3] The court of appeals found that petitioner was detained at the functional equivalent of the border (Pet. App. A19). Had he entered the country through lawful channels, of course, petitioner would have been subject to detention by Customs officers for as long as necessary (see *United States* v. *Montoya*, No. 84-755 (July 1, 1985)) and, indeed, to a search by those officers. A long line at the Customs desk is not a Fourth Amendment violation. One who is in the process of attempting to evade the Customs Service by entering the country illegally should not be considered to have a legitimate expectation of being free from such a search or detention that could be performed at a border entry point. Even petitioner's own story to the biologist indicated that he had made a recent uninspected entry into the United States. Under the circumstances, petitioner had no right to be free from a Customs inspection.

tioner by restricting his freedom to leave, the fact is that he had no intention of leaving anyway, and therefore the detention was not, as a practical matter, a significant intrusion. See *INS* v. *Delgado*, No. 82-1271 (Apr. 17, 1984), slip op. 7.

Indeed, because petitioner had no plans to leave the laboratory for five hours, it is apparent that the seized evidence could not be the "fruit" of an illegal detention. If the detention had never occurred, petitioner still would have been at the laboratory when the Customs agents appeared, and they would have conducted the investigation and discovered the evidence. There is simply no causal connection here between the actions of the local officers, even if illegal, and the discovery of the evidence. See generally *United States* v. *Sharpe*, slip op. 7; *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 19; *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

c. In any event, although the court of appeals did not so find, we think it clear that the local officers had probable cause to arrest petitioner when they arrived at the laboratory and detained him. The three men had been discovered near the spot where the boat had gone ashore the night before. The biologist who found them knew that their story of how they came to be there was false. And they matched a description given by the Coast Guard of the three crew members who were still missing.[4]

[4] The Coast Guard described the missing suspects as: a 5'7" to 5'8" male with black hair worn close to the neck and a bushy moustache, weighing 160-170 pounds and wearing short jeans and no shirt; a blond 6' tall male weighing 150 pounds; and a 5'9" or 5'10" male with black curly hair weighing about 160 pounds (Tr. 69-71, 235-236). The Coast Guard officer "almost described [petitioner] to a tee" (Tr. 70).

Given these facts and the remoteness of the area (see Pet. App. A10), it was almost inconceivable that petitioner and his companions were not the three missing crewmen. Hence, the local officers had probable cause to arrest them for possession of narcotics.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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